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Division of Environmental Remediation
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July 10, 2002

James Colter
Department of the Navy, Northern Division
Naval Facilities Engineering Command (NAVFAC)
10 Industrial Highway, Mail Stop No. 82
Lester, PA 19113-2090

RE: Naval Weapons Industrial Research Plant
(NWIRP) Bethpage Operable Unit 2 (OU2)
Groundwater Remedy,
Nassau County Sites No. 1-30-003 B.

Dear Mr. Colter:

The Department of the Navy (the Navy) has issued a draft Record of Decision (ROD) for Operable Unit 2 of the Naval Weapons Industrial Reserve Plant (NWIRP) Bethpage Plant 3 Facility. This NWIRP ROD was distributed to the public, including the New York State Department of Environmental Conservation (NYSDEC) and the New York State Department of Health (NYSDOH), for review. This letter serves to transmit NYSDEC and NYSDOH comments.

General Comments

1. There was no Proposed Plan issued by the Navy. A Proposed Plan is a prerequisite for a ROD in accordance with the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as detailed in the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), and as required by New York Environmental Conservation Law (ECL) Title 6 New York Codes Rules and Regulations (NYCRR) Part 375.

2. The NCP and the ECL require that any proposed action be screened for protection of human health and the environment, short term effectiveness, long term effectiveness, reduction of toxicity, mobility and volume, feasibility, and community acceptance. This has not been done.

3. The Department of the Navy reviewed the NYSDEC PRAP and ROD for the OU 2 Groundwater remedy for the Northrop Grumman and the NWIRP sites, commented on these documents and subsequently concurred with the NYSDEC OU2 ROD. The Navy originally proposed an individual ROD for the NWIRP Bethpage groundwater but instead agreed to the NYSDEC Groundwater OU 2 ROD. Therefore, any ROD issued by the Navy for the NWIRP Plant site alone, should not be

entitled, or referred to as the OU 2 Groundwater ROD since that nomenclature would create confusion by having two definitions for the term OU2.

4. Overall, the language in both the Groundwater Remedial Program and the Public Water Supply Protection Program are not consistent with the language from the NYSDEC's OU2 Groundwater ROD. One way to ensure State acceptance is to copy verbatim language from the NYSDEC's ROD into the Navy's ROD (see also Table 1).

5. The Navy's ROD only "recognizes" the existing groundwater extraction and treatment system downgradient of the NWIRP site. This is inconsistent with the NYSDEC's OU 2 ROD, which specifies that the contamination attributable to the Northrop Grumman and NWIRP sites will be actively addressed by the on-site Containment system. (See also legal comment Roman Numeral I (3)(A)).

6. In order for the Navy ROD to be consistent with New York State ECL, this ROD must be consistent with the NYSDEC Operable Unit 2 ROD; which it is not (see also Table 1).

Detailed Comments

Declaration for the Record for Decision

1. Statement of Basis and Purpose: The ROD issued by the Navy in the State of New York must state that the Navy ROD will comply with New York State Environmental Conservation Law (ECL). Also refer to Roman Numeral II, Legal Comments. Also, the reference to the NYSDEC ROD must specify the exact title (i.e. Operable Unit 2 Groundwater Northrop Grumman and Naval Weapons Industrial Reserve Plant Sites, Nassau County Site Numbers 1-30-003A&B).

2. Institutional Controls: The groundwater beneath the NWIRP Site can be "extracted" with permission from the Nassau County Department of Health and/or the NYSDEC with an appropriate technology to treat groundwater to applicable standards. The text must be changed accordingly.

3. Page 2, Paragraph 2&3: Each potentially responsible party (PRP) is jointly and severally liable for the scope of the remedial work. The NYSDEC cannot accept one parties official decision document that unilaterally allocates the responsibility to implement the NYSDEC's OU 2 Groundwater ROD.

4. Groundwater Remedial Program (GRP), Public Water Supply Protection Program (PWSP) and Elements Common To Both Programs

- A. Table 1(enclosed with this letter) summarizes the difference between the NYSDEC's ROD and the Navy's draft ROD for the GRP and PWSP program.
- B. The On-site Containment System must be included in the Groundwater Remedial Program.
- C. The differences listed in Table 1 for the GRP and the PWSP must be resolved before the NYSDEC can concur with this ROD.
- D. Long term groundwater monitoring is missing from the GRP program.

- E. The "Elements Common To Both Programs" section is completely missing from the Navy ROD.
- F. PWSP program item 3 in the Navy ROD is not a "remedial action" and would be better described as a monitoring activity or similar.
- G. PWSP program item 4 in the Navy ROD should be not termed a remedial action, but rather an engineering control.
- H. Item 4 of the Navy ROD should state "this action will be sufficient to cover capital costs and long term operation and maintenance expenditures that would be required to install, operate and maintain the wellhead treatment or comparable alternative." The remaining sentences should be deleted.
- I. The final sentence on page 3 of the Navy ROD should continue "...the Navy will re-evaluate the protectiveness of the selected remedy and implement all requisite measures as determined by the NYSDEC and the NYSDOH in consultation with the Nassau County Department of Health and the affected water districts."

5. Closing Declaration: The NYSDEC ROD requires annual review, not five year reviews specified in the Navy ROD.

LEGAL COMMENTS

I. The Navy is subject to federal law just as much as the Environmental Protection Agency See CERCLA § 120(a), which provides, in pertinent part,

(1) Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as an nongovernmental entity

(2) All guidelines, rules, regulations, and criteria which are ... applicable to remedial actions at such facilities shall also be applicable to facilities which are owned or operated by a department, agency, or instrumentality of the United States in the same manner and to the extent as such guidelines, rules, regulations, and criteria are applicable to other facilities. No department, agency, or instrumentality of the United States may adopt or utilize any such guidelines, rules, regulations, or criteria which are inconsistent with the guidelines, rules, regulations, and criteria established by the Administrator under this chapter.

See also CERCLA § 120(f), which provides:

The Administrator and each department, agency, or instrumentality responsible for compliance with this section shall afford to relevant State and local officials the opportunity to participate in the planning and selection of the remedial action, including but not limited to the review of all applicable data as it becomes available and the development of studies, reports, and action plans. In the case of State officials, the opportunity to participate shall be provided in accordance with section [121] of this title.

And see also CERCLA § 121(f), which provides:

(3)(A) This paragraph shall apply to remedial actions at facilities owned or operated by a department, agency, or instrumentality of the United States. At least 30 days prior to the publication of the President's final remedial action plan, if the President proposes to select a remedial action that does not attain a legally applicable or relevant and appropriate standard, requirement, criteria, or limitation, under the authority of subsection (d)(4) of this section, the President shall provide an opportunity for the State to concur or not concur in such selection. If the State concurs, or does not act within 30 days, the remedial action may proceed.

If the State does not concur in such selection as provided in subparagraph (A), and desires to have the remedial action conform to such standard, requirement, criteria, or limitation, the State may maintain an action as follows:

- (i) If the President has notified the State of selection of such a remedial action, the State may bring an action within 30 days of such notification for the sole purpose of determining whether the finding of the President is supported by substantial evidence. Such action shall be brought in the United States district court for the district in which the facility is located.
- (ii) If the State establishes, on the administrative record, that the President's finding is not supported by substantial evidence, the remedial action shall be modified to conform to such standard, requirement, criteria, or limitation.
- (iii) If the State fails to establish that the President's finding was not supported by substantial evidence and if the State pays, within 60 days of judgment, the additional costs attributable to meeting such standard, requirement, criteria, or limitation, the remedial action shall be selected to meet such standard, requirement, criteria, or limitation. If the State fails to pay within 60 days, the remedial action selected by the President shall proceed through completion.

Nothing in this section precludes, and the court shall not enjoin, the federal agency from taking any remedial action unrelated to or not inconsistent with such standard, requirement, criteria, or limitation.

It is fundamental that a remedial action must attain ARARs, unless attainment is waived. However, in the instant matter, the draft Record Of Decision simply recites, "The selected remedy ... complies with State and Federal requirements that are legally applicable or relevant and appropriate to the remedial action **to the extent practicable** [emphasis added]". The statute requires that the Record of Decision must clearly state, either that the selected remedy will attain ARARs, or that the selected remedy will not attain some ARAR and that attainment has been waived on the ground of technical impracticability which is a proper ground for waiver per CERCLA § 121(d)(4)(C). The draft Record of Decision in the instant matter does neither. The significance of this omission is that CERCLA § 121(f)(3), quoted supra, requires that the federal agency give notice of its intent to select a remedy that does not attain ARARs so that the State has an opportunity to address it.

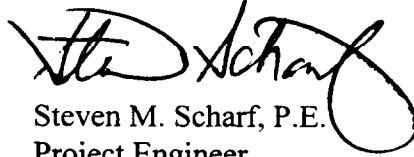
II. The Navy is subject to State law just as much as a private-sector person. See CERCLA § 120(a), which provides, in pertinent part:

State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States ... when such facilities are not included on the National Priorities List. The preceding sentence shall not apply to the extent that a State law would apply any standard or requirement to such facilities which is more stringent than the standards and requirements applicable to facilities which are not owned or operated by any such department, agency, or instrumentality.

This paragraph has been construed to mean exactly what it seems to mean, that the United States has waived its sovereign immunity with the result that a federal agency is subject to State CERCLA-like law to the same extent as a private-sector person. See: *United States vs. Commonwealth of Pennsylvania, Department of Natural Resources*, 778 F.Supp. 1328, 34 ERC 1779, __ ELR ____ (Middle Dist. Pennsylvania 1991); *Crowley Marine Services Inc. vs. Fednav Ltd.*, 915 F.Supp. 218, 42 ERC 1045, 26 ELR 21105 (Eastern Dist. Washington 1995)

Thank you for the opportunity for NYSDEC and the NYSDOH to comment on the draft Navy OU2 Record of Decision and for extending the deadline for the review. If you have any questions or require any clarification on the above comments prior to revising the draft Navy ROD, please contact me at (518)402-9620.

Sincerely,

A handwritten signature in black ink, appearing to read "Steve Scharf", with a large, stylized loop at the end.

Steven M. Scharf, P.E.
Project Engineer
Bureau of Eastern Remedial Action
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c: R. DiLombardo, Navfac Northern Division
J. Kaminski, Navair
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(Navyrodresponse.wpd)

TABLE 1: NYSDEC/NAVY OU 2 ROD COMPARISON TABLE

<u>Elements of the Selected Remedy, Bullet No:</u>	<u>DEC OU 2 ROD Requirement</u>	<u>Deficiencies in the Navy ROD that require revision</u>
Groundwater Program		
DEC Bullet 1	Standard DEC ROD Language	Bullets 1 B and 1C, not all inclusive of DEC Language
DEC Bullet 2	ONCT system	Only acknowledges ONCT
DEC Bullet 3	ONCT Effectiveness	Only Acknowledges
DEC Bullet 4	GM-38 Area Pre-design, construction and O&M	Bullet 1A. Lacks all the required DEC ROD detail.
DEC Bullet 5	Air emission controls	Not specifically covered
DEC Bullet 6	GM 38 Area Long Term O,M&M	Bullet 1D. Lacks all the required DEC ROD detail
DEC Bullet 7	Pre-design Investigation for Additional GM-38 D2 or Operable Unit 3	Not Specifically Covered
DEC Bullet 8	TAC Meetings	Not Specifically Covered
Public Water Supply	Protection Program	
DEC Bullet 9	Outpost wells	Bullet 2'A- Lacks all the required DEC ROD detail
DEC Bullet 10	Wellhead Treatment	Bullet 4'- Lacks all the required DEC detail and only has cash out option.
DEC Bullet 11	Trigger Value	Bullet 2B-Lacks all the required DEC ROD detail
DEC Bullet 12	Sample Muni-well Monthly	Not Specifically Covered
DEC Bullet 13	Connect Private Wells	Not Specifically Covered
Common Elements		
DEC Bullet 14	Long Term O&M of ONCT and GM-38 D2	Covers GM-38D2, ONCT not specifically covered
DEC Bullet 15	Yearly Performance Evaluation	Not Specifically Covered
DEC Bullet 16	MW Closure Plan	Not Specifically Covered